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U.S. Citizenship
and Immigration
Services

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: **OCT 01 2004**

IN RE:

Petitioner:
Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in November 1997. It operates a gas and food market. It seeks to employ the beneficiary as its president and general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts the beneficiary has been and will continue to render services that are primarily managerial or executive. Counsel contends that the director arbitrarily and capriciously applied standards when making his determination and that the director has improperly speculated on the existence and extent of the beneficiary's duties.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive

capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and

- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a November 12, 2002 letter appended to the Form I-140, Immigrant Petition for Alien Worker, the petitioner's day shift manager indicated the beneficiary had and would continue to have "full responsibility for, and is solely in charge of all, aspects of our operations and employees." The day shift manager indicated further that:

[The beneficiary] continues to refine and monitor operating systems and procedures to make sure that they are consistently and uniformly applied throughout the three shifts. He has complete responsibility for personnel decisions (recruitment, hiring, assignment, promotion, salary review and discharge) of employees at both the managerial and clerk level. [The beneficiary] handles all relations with our suppliers and vendors and our banks, attorneys, and accountants, and hires and directs the activities of all our contractors and other outside professional and non-professional services.

The day shift manager added that the business is open 16 hours a day, seven days a week and claimed that the first-line supervisors included himself (the day shift manager), the second shift manager, and the weekend manager. The day shift manager noted that the "managers" directed all of the subordinate employees in providing the gas/oil, repair/maintenance, washing/detailing, and food/beverage services.

On March 3, 2003 the director requested: (1) a copy of the petitioner's organizational chart including the names of all executives, managers, supervisors, and number of employees within each department; (2) a brief description of job duties, educational level, date of employment and annual salary for each employee under the beneficiary's supervision; (3) a more detailed description of the beneficiary's duties; and, (4) copies of the petitioner's California Forms DE-6, Employer's Quarterly Wage Report, for the fourth quarter of 2002.

In a March 3, 2003 response to the request for evidence, the petitioner's vice-president re-stated the initial description of the beneficiary's duties and added that the beneficiary was responsible only to the shareholders, and as such directed all aspects and made all executive and managerial decisions. The vice-president noted "the 'function' that [the beneficiary] manages is the entire business and added he makes all decisions on recruitment/personnel issues, choice of vendors and suppliers, business policies, pricing, goods to carry and services to render."

The petitioner provided its organizational chart showing the beneficiary as president/general manager, four individuals in the position of "manager," three cashiers, and one secretary. The California Form DE-6 confirmed the employment of these individuals, although it appeared that two of the "managers," one cashier, and the secretary worked part-time.

The director determined that the beneficiary's job description did not establish that the beneficiary primarily directed the management of the organization. The director also considered the petitioner's type of business and its organizational structure and determined it would be unreasonable to believe that the beneficiary would not be assisting in day-to-day non-supervisory duties. The director further determined that the lower-level

managers on the organizational chart were not managers because they did not supervise professional employees; thus, the beneficiary's position was not managerial, because the position was essentially a first-line manager position over non-managerial and non-professional employees. Finally, the director determined that the beneficiary was not a function manager because the beneficiary was involved in performing operational activities rather than managing a function.

On appeal, counsel suggests that the beneficiary's initial job description presents the level of detail that is contemplated in the Act and the regulations. Counsel contends that even if the beneficiary participates in "menial tasks" he is not precluded from establishing executive or managerial eligibility as long as he is primarily engaged in managerial and/or executive duties. Counsel also claims that an individual in charge of an entire business is qualified as a functional manager because an individual in charge of a major division or function of a business is eligible for multinational immigrant status. Finally, counsel asserts that there is no legislative, case law or regulatory support for finding that the head person of a multi-million dollar business is a first-line supervisor.

Counsel's assertions are not persuasive. The description of the beneficiary's duties does not demonstrate that the beneficiary will perform primarily managerial or executive duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. See 8 C.F.R. § 204.5(j)(5). A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, counsel for the petitioner refers to the beneficiary both as an executive, and as a manager managing an essential function. Although the regulations do not preclude an individual from performing in both an executive and managerial capacity, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing a beneficiary is both an executive and a manager. The petitioner has not done so in this matter.

Contrary to counsel's contention the petitioner has provided a nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "full responsibility for, and is solely in charge of all, aspects of our operations and employees," and directs all aspects, makes all executive and managerial decisions, and manages the function of the entire business. The petitioner did not, however, further define the beneficiary's actual daily duties. These general statements are akin to a description of an owner's responsibility that may or may not include duties that are primarily managerial or executive. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner also indicates that the beneficiary "handles all relations with our suppliers and vendors and our banks, attorneys, and accountants, and hires and directs the activities of all our contractors and other outside professional and non-professional services," and makes all decisions on "business policies, pricing, goods to carry and services to render." These more specific duties are indicative of an individual who is involved in the day-to-day administrative and operational tasks of the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner also describes the beneficiary as "refin[ing] and monitor[ing] operating systems and procedures to make sure that they are consistently and uniformly applied throughout the three shifts," and having "complete responsibility for personnel decisions." These duties involve supervisory components, however, the record does not substantiate that the beneficiary's subordinates primarily perform supervisory, managerial, or professional duties. Contrary to the petitioner's classification of four of the beneficiary's subordinates as first-line supervisors, the totality of the record shows that the four "managers" are, at most, the senior employees on staff when the petitioner's business is open.

The petitioner's business of operating a gas and food market requires employees that carry out the mundane low-level tasks of operating such a business. For the petitioner to operate 16 hours a day, seven days a week, with only four full-time and four part-time employees, the subordinate employees that the petitioner identifies as first-line supervisors/managers necessarily must assist in carrying out the low-level operational tasks of cashier, repair/maintenance, and providing gas, oil, food, beverage, and related goods. Moreover, the petitioner's remuneration of the beneficiary's subordinate employees does not reflect that the "managers" are compensated at a significantly higher level than the individuals holding the position of cashier.

The petitioner may not create artificial layers of employees to suggest that an organization is sufficiently complex to support an executive or manager; instead the petitioner must substantiate that the duties of a beneficiary's subordinates correspond to their placement in an organization's structural hierarchy. Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business, when examining the managerial or executive capacity of a beneficiary. An individual whose duties encompass duties that the duties of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. The petitioner has not submitted sufficient evidence to establish that the beneficiary's subordinates hold professional positions. As observed above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*.

Counsel correctly observes that even if the beneficiary is involved in performing "menial tasks" he is not precluded from establishing executive or managerial eligibility. However, here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion

would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as dealing with "suppliers and vendors and [the petitioner's] banks, attorneys, and accountants" and making all decisions on "business policies, pricing, goods to carry and services to render," do not fall directly under traditional managerial duties as defined in the statute. In addition, the time the beneficiary spends on first-line supervisory duties is not considered managerial. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel's contention that the head of an organization should automatically be considered a "function manager" is not persuasive. To allow the broad application of the term "function manager" to include all individuals who head organizations would render the term meaningless. If counsel claims that the beneficiary is directing or managing a function, the petitioner must identify the function with specificity, articulate the nature of the function, as well as, establish the proportion of the beneficiary's daily duties attributed to directing or managing the function. In addition, the petitioner must provide a comprehensive description of the beneficiary's duties demonstrating that the beneficiary directs or manages the function rather than performs the duties relating to the function. In this matter, the petitioner has not provided evidence that the beneficiary directs or manages a particular function.

Finally, counsel's implicit assertion that the head of a company cannot be a first-line supervisor is not persuasive. Again, the totality of the record does not support a conclusion that the beneficiary's subordinates are primarily supervisors, managers, or professionals; instead the beneficiary's subordinates perform the actual tasks of operating the gas and food market. The beneficiary's actual duties relating to the petitioner's personnel are first-line supervisory duties. The petitioner has not provided an organizational structure substantiated by the record sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisory role. The beneficiary also handles the petitioner's administrative and operational tasks of dealing with banks, vendors, and suppliers, and setting prices, and determining the goods to carry and the services to render. These duties include the routine tasks necessary to operate the petitioner's business and are non-qualifying duties. Although the petitioner references that the beneficiary also explores opportunities to invest in other businesses, the petitioner has not substantiated that this is the beneficiary's primary assignment. Finally, as determined above, the petitioner has not provided a credible understanding of the beneficiary's actual daily duties. The record shows that the beneficiary is a first-line supervisor who also performs operational and administrative tasks. The AAO cannot speculate on the beneficiary's undefined daily duties. The record does not support a conclusion that the beneficiary's assignment is primarily managerial or executive.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.